IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 318

WILLIE WILSON & MORRIS GRIFFIN,

Petitioners in Certiorari,

vs.

UNITED STATES OF AMERICA

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Now come Willie Wilson and Morris Griffin, petitioners in certiorari, and petition this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The opinion of the Court of Appeals affirming these convictions (R. 276-277) is reported at 255 F. 2d 686 and is attached as Appendix A, together with Judgment and Order Denying Rehearing. The very brief opinion of the Court of Appeals virtually adopted the lower Court's opinion which is reported as United States vs. Wilson and Griffin, 158 F. Supp. 442. They appear in this record Pages 222 through 264, including the Appendix to the Opinion. It is attached as Appendix B to this petition.

Concise Statement of the Grounds of Jurisdiction

The opinion (R. 276-277) and judgment (R. 278) of the Court of Appeals are dated June 13, 1958;

The date of the Application for Rehearing was June 30, 1958 R. 279-281). The date of the Order or Judgment denying rehearing was July 30, 1958. (R 282). There was no opinion on rehearing.

The jurisdiction of the Supreme Court of the United States is invoked under (1) Rule 19 (b) where District Court and Court of Appeals "has decided an important question of Federal Law which has not been, but should be, settled by this Court", (2) 28 U. S. C. A. 1254 (1), (3) and under and by virtue of 18 U. S. C. A. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U. S. 661, 666, 54 S.Ct. XXXIX). (4) Also, Rule 19 (1957 Pocket Parts USCA) Section (b), other portions thereof in addition to part quoted.

Questions Presented

1. Whether officers who merely see a "heavily loaded" or "overloaded automobile", without any other grounds then present, can stop the automobile, search it for contraband, arrest the occupants, and then proceed to convict them. All of this over a timely motion to suppress the evidence, timely motion for acquittal, and timely motion for new trial.

2. Whether the decisions by this Court, in the cases of Giordenello vs. United States, Volume 2, Law Edition, 2nd. Page 1503, and Jones vs. United States, Volume 2, Law Edition, 2nd. Page 1514, are the governing rules, together with the other cases herein cited. Namely: Merely seeing an "overloaded automobile" supplies no probable cause in this case, the search was not incident to a legal arrest, and the arrest herein was illegal.

3. Upon a mistrial a second trial could not be had by a new jury out of the existing panel, but there had to be a second venire.

4. The making of a jury list is not a judicial act. The manner of securing names for the jury lists is for the Jury Commissioner and the Clerk to determine. This duty is non-delegable and no other person has a right to participate in such selection. The trial Court has only the power to sit in review of their acts and conduct.

The law requires that the selection of names to go into the jury box be made by the commissioner of jurors and by the Clerk of the Court. No other person or official has the right to participate in such selection.

5. Must jurors in a Federal Court possess qualifications set by the State and the Federal Government. The Civil Rights Law (Public Law 85-315; 71 Stat. 634) limits it strictly to Federal qualifications. Former laws require both State and Federal qualifications. Our contention is that this is not a matter of grace—but of right, and in conformity to the Sixth Amendment—that the Sixth Amendment requires both, "jury of the State and district" and therefore that portion of the Civil Rights Act, namely, Section 152, is void and contrary to the Sixth Amendment of the United States Constitution.

This is an important question of Federal Law, which has been decided by the District Court below and by the Circuit Court of Appeals affirming said cause, but has not been decided by the Supreme Court, but should be, and should be settled by this Court. (Rule 19(b) 28 U.SC.A.. 1957. Pocket Parts.)

6. Or since there is no separability clause in the Civil Rights Act of 1957, a determination that Section 152 is void as contrary to the Sixth Amendment, then the entire Civil

Rights Act of 1957 is also void. (Rule 19 (b), Supra.)

7. Whether the atmosphere at this trial was such that it was fair and impartial, and if it were not, whether it deprived these petitioners of their liberty without due process of law, as secured to them under the Fifth Amendment of the United States Constitution.

Constitutional Provisions, and Statutes, Which This Case Involves

1. Amendment Four, United States Constitution.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Amendment Six, United States Constitution.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. Amendment Five, United States Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. Civil Rights Act of 1957, Public Law 85-315, 71 Stat. 634.

The question whether Section 152 thereof, is contrary to the Sixth Amendment is hereby raised.

If the Court determines that Section 152 is void, then it may also determine whether the entire Civil Rights Act of 1957 is void, there being no separability clause.

A copy of the Civil Rights Act of 1957 is attached as Appendix C.

Statement of the Case

The petitioners were indicted September 11, 1957, on four counts, namely: alleged violations Internal Revenue Code, sections 5632 in count one, 5008 (b) count 2, 7206 (4) count three, 5691 count four. These, of course, were charges of violating the law as to whiskey or distilled spirits.

The defendants were tried by jury, on their pleas of not guilty, and convicted as charged.

The evidence for the government was by two internal revenue agents, testifying in substance that they saw a car—that it "appeared overloaded". On that, they turned around, followed the car, gave chase and blew the siren, and the car came to a stop. Griffin, allegedly, left the scene and was arrested later. In the car were a number of gallons of untaxpaid liquor. Petitioner, Wilson, was arrested at the scene.

The officers searched the car, found the liquor. The officers had no search warrant.

The officers did not testify they were on patrol. They offered no evidence that they were expecting these defendants, or petitioners, or anyone else, on that route, place, or any other route or place.

Officer McGinnis (record 132) stated he knew "a Wilson" was dealing in whiskey or had a reputation to that effect—but although he recognized "a Wilson" in the car that he did not know "that particular Wilson" and thought it was his brother "General Wilson" (record 133).

That one thing—"appeared overloaded" was the inception of the search and seizure. They recognized no one at the inception. They had no description of this car or any other car. They had no prior information. They were not looking for anyone. They had no information that anyone was using a certain highway, or any highway for that matter.

Petitioners moved to suppress the evidence before the trial. It was denied. (Record 3 through 44-47).

Motion for new trial was made and denied. (Record 151-154, and 222-242).

In addition, the petitioners were put to trial on the morning of November 20, 1957. A mistrial was ordered (record 57-58) about 11:30 that morning. Petitioners were put back to trial at 1:30 the same day. A motion for continuance was promptly and duly made (record 47-49, 75-76). This was denied.

In addition, in motion for new trial, styled "additional grounds" (record 165-172) petitioners raised two other points, namely, that selection of the venire, under the Civil Rights Amendment of September 9, 1957 was contrary to the Sixth Amendment to the U. S. Constitution, in that service of women on juries in Alabama is not allowed by the Alabama law, and, the petitioners alleged, were therefore ineligible to be on the venire because of that, the Alabama law.

That is the immediate point, which is decisive of the larger point, namely: Must jurors in a Federal Court possess qualifications set by the State *and* the Federal Government. The Civil Rights law limits it strictly to Federal qualifications. Former laws require both State and Federal qualifications. Our contention is that the Sixth Amendment requires both, "jury of the State and district" and therefore that portion of the Civil Rights Act is void, and contrary to the Sixth Amendment of the United States Constitution.

The entire Civil Rights Act of 1957 may also be void if the Court determines that Section 152 is void, is contrary to the Sixth Amendment, since there is no separability clause in the Civil Rights Act of 1957.

And, secondly, because of other matters their names were illegally in the jury box, and that the venire was therefore void, namely: Petitioners Exhibit No. I—letter from Judge Frank M. Johnson, Jr., to W. O. Baldwin, Jury Commissioner, dated September 19, 1957 (record 218, and testimony of W. O. Baldwin Jury Commissioner (record 176-184), and testimony of R. C. Dobson, Clerk of the U. S. District Court and Jury Commissioner (record 184-187).

Specification of Errors to Be Urged

The Court of Appeals erred:-

1. In holding that the lower Court did not err in denying the defendants motion to suppress the evidence.

2. In holding that the lower Court did not err in not granting the motions for acquittal.

3. In holding that the motion for continuance should not have been granted in the lower Court.

4. In holding that the jury venire was not void because of the letter of Judge Frank M. Johnson, Jr., to W. O. Baldwin, Jury Commissioner, and to R. C. Dobson, Jury Commissioner and Clerk (R. 218, 176-184).

5. In holding that Section 152 of the Civil Rights Act of 1957 is not void and unconstitutional as contrary to the Sixth Amendment of the Constitution of the United States.

6. In holding that the Civil Rights Act of 1957 was not void and unconstitutional as contrary to the Sixth Amendment of the United States.

7. In holding that the motion for new trial for the defendants, or petitioners, should not have been granted.

8. In affirming the District Court.

Reasons for Granting the Writ

1. This was an illegal search and seizure.

The Court, in its order of November 15th, declining to suppress the evidence, cited *Carroll* v. *U.S.*—267 U.S. 132 as its leading case. The facts here, we believe, are different.

The Court also cited three other cases:

Koenan case—230 Fed. 2nd 662: which held " . . . treasury agent had been informed that defendants were using certain highway . . . agent was given description of automobile . . . had oversized tires . . . heavy duty springs . . . Treasury agent had received trustworthy information from confidential informer . . . were using certain highways . . . given description of automobile and license plate . . ."

The Court also cited *Medina Case*—158 Fed. 2nd 953 which recited: ". . . on information believed by custom officers to be reliable . . ."

The Court cited *Cannon Case*—158 Fed. 2nd 953, which recited: ". . . they had information which they believed was reliable . . ."

Here, by pure chance, the officers met a car that appeared overloaded. That was all that started the search.

That one thing—overloaded—was the inception of all the other conduct of the officers.

At that inception, and we do not believe it is contended otherwise, the officers recognized no one; they had no

information; they were not looking for anyone; they had no description of this car or any other car; they had no information that any one was using a certain highway, or any highway for that matter.

At the inception—the turning around by them—which was the commencement of all their acts which culminated in the search and seizure they, of course, had no probable cause. We do not believe it necessary to question that seeing a mere "overloaded" car—or "appeared overloaded" is sufficient to supply probable cause under the *Carroll* or any other decision.

Their probable cause was supplied after the commencement of the search and seizure and before its culmination.

Can they divide their entire act into separate parts?—Can they divide their entire act into separate parts and find the probable cause, which initially was lacking, at any stage along the division?—If so, at what stage, after they commence, when they still lack probable cause that they must stop?—If there is no stage, after commencement that they must stop, when they still lack probable cause, then do they have the right to continue search and seizure until the last final act when they finally discover something?

The Fourth Amendment we submit certainly means that probable cause must exist at the commencement.

The Court can readily see that it must exist at the commencement. No rule could be laid down if subject, after commencement, to the chaos of what might be found or at what stage found, to the last ultimate search.

Carroll case: Koenan case: Medina case: Cannon case:—all set out the circumstances of probable cause before the commencement of activity that resulted in seizure.

That is the difference in those cases and this case.

Here, only one thing, a mere—"overloaded"—was the entire commencement.

The District Court has misconstrued this case in the light of the cases it cites in its opinion.

As we have stated, the fact that these officers saw an "overloaded automobile" started the whole thing. No crime had been committed in their presence. Defendants, or petitioners, were violating no speed or traffic law. They were simply on an "overloaded automobile" and one officer thought he recognized a "General" Wilson, but it turned out that the man in the car was not "General" Wilson. Attached is Appendix D, as provided by Rule 23 as an excerpt from the officer's statement (R *84, 112, 133*).

With the millions of vehicles in this country that might be "overloaded" we submit that the rule should not be that officers can go ahead and search these vehicles with nothing more. It developed later that they knew these defendants, but they did not at the time of inception.

2. The foregoing covers Specification Numbers 1 and 2 listed herein.

B—The Court erred in not holding that the continuance should have been granted.

Continuance should have been granted.

U.S.C.A.—Title 28—Sec. 1864, Note 15, Page 616.

"Upon a mistrial a second trial could not be had by a new jury out of the existing panel, but there had to be a second venire. Wilson v. Barnum, C.C. Pa. 1849, 1 Wall. Jr. (C.C.) 347, 30 Fed. cas. No. 17,787, certified questions answered 8 How. 258, 12 L. Ed. 1070."

The opinion in the Wilson Case is a very good case, the opinion having been written by Justice Grier.

USCA—Amendment 6—Note 130, Page 345, citing *Harris v. United States, 10 Fed. 2nd 358*—which reads:

"It is claimed by the plaintiff in error that the court in ordering an immediate retrial of this cause over his objec-

tion denied to him the benefits of the provision of the Sixth Amendment to the Constitution of the United States, which guarantees to every person accused of crime a speedy public trial by an impartial jury.

"The plaintiff in error was represented by counsel, confronted by the witnesses, fully informed of the nature and cause of the accusation against him, and was tried by an impartial jury. Nor does it appear from the record that he offered any reason whatever for the continuance of this case *until the next term of the court.*"

This case evidently holds from our italicized portion that had timely application been made for continuance, instead of waiting to a term later on motion, it would have been error not to have continued.

In the present case we made due motions for continuance at every proper and timely step of the way.

These are the only two cases annotated in the citations as above by West Publishing Company on this point.

Out of the thousands of cases that have appealed to higher Federal Courts only two involve the right of continuance under the peculiar and extraordinary circumstances as existed in this case.

The very fact that a situation for continuance such as this has never been carried to the higher Courts but twice is certainly indicative, and eloquent evidence, that a continuance should have been granted.

Here, the mistrial followed immediately a case which was also mistried, then continued for the term. The usual custom.

The mistrial here was declared about 11:15 to 11:30.—We were put to trial then at 1:30 p.m. The time out for lunch, for the Court, the government, the witnesses, the jurors, the defendants, their counsel was from 12:00 to 1:30. Actual time—therefore—from the first trial to the second was only 30 to 45 minutes excluding time for lunch.

The jury panel—if not a majority—whatever the record on voir dire discloses—knew of the mistrial; all jurors heard one juror answer he knew the cause, which he gave. All on voir dire heard the ones who did answer that they knew of the mistrial.

The time element—a mere 30 to 45 minutes, excluding lunch, certainly could have indicated to that jury panel there was a rush about trying these defendants.

The preceding case mistried—then continued for the term—certainly could have indicated to the jury panel that this case had special importance. When, as a matter of fact, the preceding case, involving Civil Rights, was more important than this—if it could be said that one case was more important than another.

The defendants were faced with two Government witnesses. They had none. They did not testify. These defendants were entitled to every safeguard of a fair and impartial trial under the Sixth Amendment. They went to trial, excluding lunch time, within 30 to 45 minutes of the mistrial; the panel on voir dire heard the reasons; certainly it could be presumed that the panel also knew of the immediately preceding case being mistried and continued for the term.

This Action of the Trial Court amounts to an indirect emphasis that the defendants did not take the stand. The existing panel, or most of them, knew of the mistrial some 30 or 40 minutes preceding; which was because the District Attorney made comment to the effect that the defendants did not testify. But here, the second trial, they did not testify in it. Knowing that they did not testify at the first trial, and seeing that they did not testify at the second trial, surely this emphasis was before the jury. The rule is, not whether there was injury, but failure to testify cannot be brought to the jury's attention in any manner.

C—The Court erred in denying the defendants claim that the jury venire was void. (Record 232-236)

Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner Secs. 275, 276, Jud. Code, 28 U.S.C. secs. 411, 412, 28 U.S. C.A. secs. 411, 412. This duty of selection may not be delegated. United States v. Murphy, D.C. 224 F. 554; In repetition for Special Grand Jury, D.C. 50 F. 2d 973 . . . That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

Glasser v. *United States*
62 Supreme Court Reporter 457 (472).

The law does not create any special method of selection and leaves the manner of securing names completely to the discretion of the Jury Commissioner and Clerk. Walker v. United States, 8 Cir., 93 F. 2d 383, certiorari denied 303 U.S. 644, 58 S.Ct. 642, 82 L. Ed. 1103.

Dow v. *Carnegie—Illinois Steel Corp.*
100 F. Supp. 494 (497)

The making of a jury list is not a judicial act. The manner of securing names for the jury lists is for the Jury Commissioner and the Clerk to determine. Walker v. United States, supra. This duty is non-delegable and no other person has a right to participate in such selection.

This Court has only the power to sit in review of their acts and conduct.

Glasser v. *United States*
315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680.

Dow v. *Carnegie—Illinois Steel Corp.*
100 F. Supp. 494 (497)

This petition suggests the selection of the special grand jury by certain citizens and organizations of Luzerne County. Such method of selection is not permitted by the laws of the United States. The law requires that the selection of names to go into the jury box be made by the commissioner of jurors and by the clerk of the Court. Section 412, United States Code Annotated, Title 28. No other person or official has the right to participate in such selection. U. S. v. Murphy (D.C.) 224 F. 554.

In re Petition for Special Grand Jury
50 F. (2d) 973

United States v. *Murphy et al.* *224 Federal 554*

"The United States District Judge of the Northern District of New York, at the suggestion of the United States Attorney for said district, and deeming it advisable and proper, directed that a new jury list or list of names be selected from the county of Onondaga to be placed in the jury box."

But behind and underlying all is the general principle universally recognized, that the courts cannot justly or safely permit or sanction any participation by unauthorized persons, or by parties litigant, or their representatives, in the selection of names of persons. "The law has specified who is to make the selection of jurors and it is unsafe and unwise to permit a departure from its provisions. Courts cannot stop to inquire in each case whether such participation, however indirect, has been harmful in a given case. The only safe rule is to prohibit and condemn it absolutely.

And the government itself, as a party and representing all the people and their interests in prosecuting offenders and alleged offenders, is no exception to the rule. Only the clerk and commissioner of jurors are permitted by Law to participate in the actual selection of names."

The Murphy case is one of the strongest cases we have read. That opinion is one of the most complete opinions we have seen.

The trial Judge (R 212) evidently was under the impression that his action was in conformity with Title 28, Sections 1861-1871. We submit that there is nothing in those statutes which change the rule of the cases herein cited.

Nor has any of this been waived:

> "Before any waiver can become effective, the consent of government counsel and the sanction of the Court must be had, in addition to the express and intelligent consent of the defendant."
>
> *Patton* v. *United States*
> *74 L. Ed. 854 (870). Supreme Court*

The Jury Commissioners had advantage of the Bulletin No. 448 from the Administrative Office of the United States Courts, dated September 16, 1957 (R 220-222) The letter from Judge Johnson, dated September 19, 1957 (R 218-220) we believe is contrary to the decisions herein cited. Particularly, when the Administrative Office had sent them the Bulletin of September 16.

D—The Court erred in denying the defendants contention that the Sixth Amendment to the Constitution of the United States requires that the jury be qualified according to the law of the State of Alabama, as well as Federal law. (Record 236-242)

SIXTH AMENDMENT

"... impartial jury of the State and district ..."

This means, we submit, both things it says.

(1) Jury of the State

Jury of the State are those who are qualified under State law to be on the jury. No other jury could be a "Jury of the State."

(2) "And district"

Federal jury is a common law jury, except insofar as the preceding phrase, "Jury of the State qualified it."

It has long been recognized that qualifications placed on jurors by States, contrary to common law jurors, was the interpretation of the Sixth Amendment.

This was recognized by the statutes which preceded the one repealed in subsection (4) on September 9th, 1957.

History of the Sixth Amendment, and of the Judiciary Act of 1789, where Congress, by enacting this first Act, recognized the meaning of the phrase "Jury of the State and District", to be a dual purpose, namely:

(a) Qualifications of jurors by law of vicinage;
(b) Vicinage;

Each, and both, were purposes of the Amendment. A resident, without qualifications of the vicinage, the State, could not be a "juror." A non-resident, with qualifications of the vicinage, could not be a "juror".

A "Jury"—12 jurors—had to, all of them, to be a "Jury", possess qualifications of the State, or vicinage, and also be residents. No other group would constitute a "Jury".

The repealed statute, and former statutes, requiring in effect that jurors in Federal cases must possess the quali-

fications of jurors under State laws, were not, we submit, acts of grace by Congress—but were, we submit, enacted because of the 6th Amendment—in recognition, and to conform with the 6th Amendment ". . . Jury of the State . . ."

No question is raised that women are not good jurors. They are. The larger question is whether a Federal jury, in all instances, shall have the qualifications of a jury of the State, and also the qualifications imposed by Federal law. And, whether or not "Jury of the State" is now inoperative by the "Civil Rights" law of September 9th, 1957, that is, we submit for decision whether the "Civil Rights" law takes precedent over the Sixth Amendment, or whether that section of the "Civil Rights" law is unconstitutional because of the Sixth Amendment.

> "We first inquire what is embraced by the phrase 'trial by jury'. That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were: (1) That the jury should consist of twelve men, neither more nor less; . . ."
>
> *Patton v. United States 74 L. ed. 854 (858) Supreme Court;*
>
> *See: Amendment 6—USCA—Note 123—Page 343.*

"Legislation of this character was needed in order to bestow upon women the right to serve on juries. Woman suffrage Amendment of California nor the Nineteenth Amendment to the Constitution of the United States automatically conferred it. United States v. Wood, 1936, 299 U.S. 123, 57 S. Ct. 177, 81 L.Ed. 78; People v. Lenson, 1917, 34 Cal. App. 336, 167 P. 406; In re Mana, 1918, 178 Cal. 213, 172 P. 986, L.R.A. 1918 E. 771"

United States v. *Ballard*, 35 F. Supplement 105 (107).

"The question still appears to be whether Congress has seen fit to impose the burden of jury service upon them . . . The reason for this is that the first state to permit women to serve on its juries was Kansas and it did not do so until 1913, Laws 1913, a.215, and we cannot believe that Congress would have pioneered in the movement to put women on juries without so expressing itself in unmistakable terms . . . Furthermore, in the absence of definite language we cannot assume that Congress would require women on federal juries . . ."

Quinones v. *U. S.*
161 F. 2d 79 (82)

"5. Jury Key 33 (1) Inclusion of women among those called to serve on juries in federal courts is not required by the Constitution.

"6. Jury Key 33 (1) Inclusion of women on the jury lists used in the District Court of the United States for Puerto Rico is not required by statute and their exclusion was not ground for reversal of conviction. Code Cr. Proc. Puerto Rico 1935, secs. 184-186; USCA sec. 867."

Quinones v. *United States*
161 F. 2d 79

Therefore:

The 19th Amendment does not give women jury service. No Act of Congress in "definite language" has been passed giving women jury status. The Constitution does not require that women serve.

Only, by laws of the States have women served on Federal juries.

This confirms, we submit, that "Jury of the State" in the Sixth Amendment means those qualified to sit on State juries.

The writers of the Constitution knew what they meant, and many of them were lawyers.

If they had meant Federal qualifications alone, they would have simply said "jury of the district", for use of the word "district" would have limited the qualification to Federal Law if that is what they meant—but they said "Jury of the State and District".

They, of course, knew what "Jury" meant. They knew what "citizens" meant. They knew what "Resident" meant.

They did not say, "jury composed of residents of the state and district".

They said a "jury of the State and district," and when they used the phrase "jury of the State" the meaning is inescapable that it had to be a jury qualified in that state.

The writers of the Constitution put this Amendment in the Bill of Rights and it was so carefully done to say that they did not mean "jury of the State" but merely meant citizens or residents of the State would simply be concluding they wrote an indefinite article, when they could have said "residents" or "citizens" if that were the certainty they meant.

Notes 1 and 4, Title 28, Section 1861 cites cases that Congress has power to prescribe qualification of jurors. Note 4 is incorrectly stated for the case actually reads, "The qualification of jurors in the federal court upon this ground is controlled by federal law."

Note 2 shows that qualification is referred to as a general qualification, such as age, citizenship, and etc. . . .

U.S. v. Williams, C.C. Minn. 1871, Fed.Cas. No. 16,716. From that it does not appear that the two preceding cases are any more than the general qualification.

Apart from the Constitutional question Congress has not expressly qualified women to sit on a federal jury. They are not qualified under the common law.

They are not qualified under the State law. Title 30, Sec. 21, 1940 Code of Ala. Under *Quinones* v. U.S., F. 2d 79. Congress would have to enact express legislation. Under *United States* v. *Ballard*, 35 F. Supp. 105 (107), the 19th Amendment does not qualify them as jurors.

Under these two decisions women cannot serve on Federal Jury where the State law does not provide it.

If Section 152 falls, then the entire Civil Rights Act of 1957 may also fall. There is no separability clause.

Federal Lobbying Case.
United States v. *Harris*
74 Sup. Ct. 808, 98 L. Ed. 989
Carter v. *Carter Coal Co.*
56 Sup. Ct. 855, 80 L. Ed. 1160
Williams v. *Standard Oil Co.*
49 Sup. Ct. 115, 73 L. Ed. 287

But whether Section 152 falls or the entire Act falls, in any event, these petitioners are entitled to a reversal. The petitioners, who are Negroes, question the Civil Rights Act of 1957, as herein stated. The Damoclean Sword is two-edged.

F.—The Court erred in affirming the District Court, and we submit that the motion for new trial should have been granted. The atmosphere of such trial, from this record is not due process of law as secured by Amendment Five, nor, with the venire, or a part thereof having heard of the immediate preceding mistrial in this case, because of comment of defendant's failure to testify, be such a venire as to be an impartial jury as secured by the Sixth Amendment.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN C. WALTERS,
Court Square,
Troy, Alabama.
Counsel for Petitioners.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17051

WILLIE WILSON AND MORRIS GRIFFIN, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Middle District of Alabama

(June 13, 1958)

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

PER CURIAM: In his well considered and thoughtful opinion,[1] the district judge carefully stated and as carefully canvassed the questions raised on this appeal and fully and correctly dealt with them. Because he did, it will serve no useful purpose for us to restate or rediscuss them. It will be sufficient to say that we agree with the opinion of the district judge, and, upon the considerations and for the reasons stated by him, the judgment is AFFIRMED.

[1] United States v. Wilson and Griffin, 158 F. Supp. 442.

CAMERON, Circuit Judge: I concur in the result.

A true copy

Test: EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit.

By——, ——,
Deputy.

New Orleans, Louisiana:

JUDGMENT

Extract from the Minutes of June 13, 1958

No. 17051

WILLIE WILSON AND MORRIS GRIFFIN,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Cameron, Circuit Judge, I concur in the result."

ORDER DENYING REHEARING

Extract from the Minutes of July 30, 1958

No. 17051

WILLIE WILSON AND MORRIS GRIFFIN,

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CR. No. 10,990-N

Filed January 2, 1958.
R. O. Dobson, Clerk.

UNITED STATES OF AMERICA

v.

WILLIE WILSON AND MORRIS GRIFFIN

MEMORANDUM OPINION

This cause is now before the Court upon the motion, as amended, filed separately and severally by the above-named defendants; said motion seeks to have this Court set aside the jury verdicts of guilty rendered November 20, 1957, as to each of these defendants and seeks to have the Court grant to them a new trial.

Several grounds are set up in the motion. For convenience, they may be grouped as follows:

(1) That the Court committed error in overruling the motion of the defendants to suppress the evidence on the ground that the evidence was obtained by reason of illegal search on the part of the government's agents without probable cause and without a search warrant.

(2) That the Court committed error in overruling defendants' motion for continuance made and filed following the Court's declaration of a mistrial. The overruling of this motion for continuance required the defendants to go to trial again on the same date.

(3) Defendants claim the jury venire was void because the names placed in the jury box by the jury commissioners were not selected by said commissioners.

(4) Defendants claim their constitutional rights were violated in that the Congress of the United States had no authority to prescribe qualifications of Federal jurors when such do not require the jurors to be qualified according to the law of the State of Alabama.

These grounds will be discussed in the order listed. However, prior to any detailed discussion, it is considered essential to set out the history of the case. These defendants were jointly indicted on September 11, 1957, by a grand jury convening in this district. Said indictment charged these defendants with violating certain sections of the Internal Revenue Code of the United States. The sections alleged to have been violated were: 5632 (concealing and aiding in the concealment of nontax-paid whiskey, 5008(b) (possession of 75 gallons of nontax-paid whiskey), and 7206(4) (the removal, deposit and concealment of 75 gallons of nontax-paid whiskey). To this indictment the defendants, separately and severally, entered pleas of not guilty. The case was called for trial on the morning of November 20, 1957, the government being represented by the United States attorney for this district and his assistants, and the defendants being represented by two attorneys of their choice. Upon inquiry and after the jurors were qualified generally, both the government and the defendants, through their respective counsel, announced ready for trial. A jury was selected after being qualified specifically for this case. The testimony was taken and the case proceeded to the point of argument by the counsel to the jury. It appeared on the trial of this case that the theory of the defense for the defendant Griffin was one of mistaken identity. Neither of these defendants testified; during the course of the argument by the United States attorney, reference was made by him to the fact that the defendant Griffin had not denied he was present at the time and place the officers had testified. This Court, upon proper motion thereupon declared a mistrial at approximately 11:15 a.m. Since the case had only taken approximately two hours to try, the Court reset the case for trial at 1:30 p.m. on the same date. These defendants objected to being put to trial again during the same term and filed a written motion for continuance; this motion was denied and another jury was

qualified and selected at 1:30 p.m. on the same date. The questions and comments concerning the qualification and selection of the jury for this second trial are set out verbatim in Appendix "A" to this memorandum opinion.

I. Defendants' Motion to Suppress the Evidence.

On November 13, 1957, these defendants, separately and severally, filed a written motion with this Court, seeking to have the Court enter an order suppressing the evidence obtained by the agents of the government upon the ground that said evidence was obtained by reason of an illegal search without probable cause and without a search warrant. To this motion of the defendants, the United States filed a motion asking the Court to quash the defendants' motion to suppress this evidence. This motion to quash was based upon the fact that the defendants' motion was uncertain and vague, that it failed to state that the defendants claimed possession of the illegal whiskey seized by the agents, and that it failed to state that the seizure of the whiskey was from their premises. On November 15, 1957, which was several days prior to the trial before the jury on the merits of the case, this Court conducted a hearing in open court in order to determine the legality of the evidence the government's agents obtained. After hearing the evidence, this Court determined that the motion to suppress was not well taken and on November 18, 1957, filed a written memorandum opinion. The pertinent parts of that opinion are as follows:

> "In order to be more than fair to these defendants and in order to eliminate the necessity of an amendment, this Court overruled and denied the motion to quash filed upon behalf of the United States of America; this action overruling the motion to quash was taken in the face of the case of *Scoggins* v. *United States*, 202 F. 2d 211, and the case of the *United States* v. *White*, 228 F. 2d 832.
>
> "All the evidence in support of defendants' motion to suppress was entered by virtue of stipulation entered into by the parties. The pertinent portions of this stipulated evidence show that two agents for the Alcohol &

Tobacco Tax Unit of the Treasury Department were, on August 26, 1957, at about 9:50 a.m., traveling south on U.S. Highway 331 at a point about 1½ miles south of Sprague, Alabama, in this district, at which time they saw a 1951 Ford approaching them, which Ford automobile appeared to them to be heavily loaded, with the rear end of the car extremely low. One of these defendants, Morris Griffin, was recognized as being in the front seat of the car. Griffin was known to these agents as being a Negro male that had a record and reputation for being in the nontax paid whiskey business.

"The law is well settled that where there exists probable cause to believe that a felony is being committed in the presence of officers, no warrant is needed to stop and search the automobile. See *Carroll* v. *U.S.*, 267 U.S. 132. The United States Circuit Court of Appeals for the Fifth Circuit has followed the law in the Carroll case in several cases, three of which are *Kaufmann* v. *U.S.*, 230 F. 2d 662; *Medina* v. *U.S.*, 158 F. 2d 955; and *Cannon* v. *U.S.*, 158 F. 2d 953. This Court concludes from the circumstances in this case that the officers had reasonable cause for believing that these defendants were committing a felony in their presence and were justified in stopping and searching and seizing and arresting."

This Court is still of the opinion—and for the same reasons—that defendants' motion to suppress is not well taken.

II. The Claim of the Defendants That They Were Prejudiced by Being Put to Trial Again Immediately Following the First Trial, Which Ended in a Mistrial.

It should be noted that the reason the Court declared a mistrial in the first case was not because of any misconduct on the part of the defendants or their counsel, but because of an inadvertent statement made by the United States attorney in his closing argument to the jury. There is some question, that need not be discussed at this time, that the statement made by the United States attorney in his closing argument was prejudical to such an extent that

it was necessary for the Court to declare a mistrial. However, since the case had only taken a short while to try, this Court felt and still feels that the proper course in order to fully protect the rights of these defendants was to declare a mistrial, and that action was taken. There is no suggestion that the "atmosphere" which prevailed during any of the proceedings was prejudicial to the defendants. The record relating to the qualification of the jury for the second trial, which is set out in Appendix "A" of this memorandum opinion, reflects that all the jurors who sat on the first case were disqualified by the Court and that all the jurors who had heard any of the testimony or argument, or who had heard the testimony or arguments discussed, were declared by the Court to be disqualified insofar as the second case was concerned. In other words, the parties were, after an extensive *voir dire* examination by the Court, tendered a venire of jurors that had not had anything to do with the first case, that had heard none of the evidence in the first case, and that had not heard any discussion concerning the evidence or the arguments in the first case. The most that the defendants can complain of, insofar as the qualifications of the jurors for the second case are concerned, is that several of them had heard that the Court had declared a mistrial in the first case because of some statement the United States attorney made in his closing argument. None of the members of the jury venire tendered for the second case indicated that they had heard what the statement was. The defendants have completely failed to show this Court how this knowledge on the part of these jurors could have possibly prejudiced them. This Court has studied the record and cannot, on its own, find any possibility of prejudice to either of these defendants by the fact that some of the jurors had heard that the first case ended in a mistrial. There is no question but that the matter rested in the sound discretion of the trial court.

In the case of *Harris v. United States*, 10 F. 2d 352, (6 C.C.A. 1926), the court stated:

> "It is claimed by the plaintiff in error that the court in ordering an immediate retrial of this cause over his objection denied to him the benefits of the provision of

the Sixth Amendment to the Constitution of the United States, which guarantees to every person accused of crime a speedy public trial by an impartial jury.

"The plaintiff in error was represented by counsel, confronted by the witnesses, fully informed of the nature and cause of the accusation against him, and was tried by an impartial jury. Nor does it appear from the record that he offered any reason whatever for the continuance of this case until the next term of the court."

In the case of *Neal* v. *United States*, 22 F. 2d 52, (4 CCA. 1927), Judge Parker gives a good discussion of this point. The circuit court held that whether the second trial should be held immediately or be continued was within the sound discretion of the trial court. The circuit court held that the trial judge was in error in not questioning the jurors more closely. The court stated:

"In selecting the jury for this second trial, exceptions were taken to the refusal of the trial judge to ask certain questions of the prospective jurors on their voir dire, and these exceptions present the principal question before us."

Even though the court reversed the trial court, the opinion makes it clear that in the absence of an abuse of discretion, the decision as to whether or not a continuance will be granted rests within the sound discretion of the trial judge. The court stated:

"The motion for continuance was a matter addressed to the sound discretion of the trial judge, and his action thereon is not subject to review, in the absence of clear evidence of abuse. [cases cited]. And it cannot be said that the refusal of a continuance is an abuse of discretion merely because there has been a mistrial of the case at the same term of court. Although the fact that the case has been once tried at the term, and that jurors not engaged in the trial have probably heard parts of the evidence and arguments and discussions of the case by parties and witnesses in and about the

courtroom, is a strong ground for continuance, it is for the trial judge, who has been present and can understand the atmosphere of the trial better than we possibly can in the appellate court, to determine whether under all the circumstances it is fairer to both sides to try the case again at the same term or to continue it.

"But where, after a mistrial, the defendant, as in this case, is put on trial again at the same term, we think that the trial judge should be very careful to see that the jury obtained is fair and impartial. Jurors who have heard a part of the evidence in a former trial, who have listened to the arguments of counsel, and who perchance have heard discussions of the case in the corridors of the court building by witnesses or bystanders, are very likely to have formed fixed opinions about the case, or some of the material issues involved in it, and, if chosen, to enter upon their duties with an attitude very different from that which the law contemplates as the attitude of an unbiased juror. And although ordinarily the question as to whether a juror is fair and impartial is a matter addressed to the discretion of the trial judge, we think that the judge is bound either to make or to permit such inquiries to be made as will enable him in the exercise of his discretion to exclude from the jury persons who have formed fixed opinions about the case and are not fair and impartial jurors within the contemplation of the law. This is true in all cases, but it is particularly important where there is a second trial at the same term and at least a part of the jurors called have heard the evidence and have been subjected to the atmosphere of the former trial.

"In this case we think that the learned District Judge erred in not making further inquiry of the jurors, for the purpose of ascertaining whether any of them had formed fixed opinions as to the guilt or innocence of the defendant. The fact that they denied that they had 'both formed and expressed' opinions was not sufficient. The real inquiry was whether the jurors were unbiased and impartial; that is to say, whether they had or had not formed such fixed opinions as to the

guilt of the accused that they would not be 'indifferent as they stood unsworn,' and, although the expression of opinion was a pertinent matter of inquiry, it was important only as showing that the opinion had been formed. If any of the jurors had formed such a positive and decided opinion as to the merits of the case, that he was not an impartial juror, he was incompetent whether he had expressed that opinion or not. [cases cited]."

This Court concludes that it did not abuse its discretion in requiring these defendants to go to trial on the same date that the mistrial was declared. This Court concludes that neither of these defendants was prejudiced by going to trial again on the same date and that this Court was more than careful to see that a fair and impartial jury was available and obtainable by the parties in the second trial. Therefore, in the absence of any indication that this Court abused its discretion and in the absence of any indication that the jury for the second trial was not fair and impartial, this Court concludes that there is no merit in the claim by these defendants that error resulted in their being put to trial the second time immediately following the first trial, which had ended in a mistrial.

III. Claim that Jury Venire Was Void.

In this third claim, the defendants state in their motion that the venire was void due to certain directives which were issued to the jury commissioners by the United States Department of Justice. Upon a hearing that the Court conducted, at which time the defendants were offered an opportunity to prove the grounds in their motion or present some evidence in support of these grounds, it was stated by counsel representing defendants that the only evidence they had in support of this ground was an article or articles which appeared in one of the local newspapers. These articles were to the effect that the United States Department of Justice had issued such a directive. However, both the jury commissioners testified that they knew of no such directive and that no such directive had ever been called to their attention. As a matter of fact, the defendants offered

no proof in support of this claim. They did, however, offer in evidence a directive from the Administrative Office of the United States Courts dated September 16, 1957. This directive is styled "Bulletin No. 488" and is set out verbatim in Appendix "B" to this memorandum opinion. They also offered a copy of a letter from this Court to each of the jury commissioners, said letter being dated September 19, 1957; a copy of this letter is being set out verbatim in Appendix "C" of this memorandum opinion.

It appears that the defendants are claiming that the directive from the Administrative Office of the United States Court and the letter of September 19, 1957, from this Court to the jury commissioners violated the rights of these defendants in that the jurors "selected" by the jury commissioners, after receiving this letter and this directive, were not the personal selection of the jury commissioners. The defendants rely on the case of *United States* v. *Murphy*, (1915), 224 F. 554, to sustain this position. A study of the Murphy case shows that it relates to the "selection" of names that went into the jury box. In the Murphy case, the evidence showed that an assistant United States attorney had personally selected for one of the jury commissioners many names that the jury commissioner put in the jury box; that the assistant United States attorney had also, in deciding upon the names he selected, excluded approximately 2,000 prospective jurors. In the Murphy case, the court held that no person or official, other than a jury commissioner, has the right or the authority to participate in the "selection" of the name of any juror to go in the jury box. Assuming that the Murphy case sets out the law, it is quite obvious that that case is not applicable to this case. It will readily appear from a reading of the directive from the Administrative Office and the letter from this Court that the "selection" of names was left entirely and completely to the jury commissioners. As a matter of fact, the directive from the Administrative Office only called to the jury commissioners' attention that part of the Civil Rights Act of 1957, Public Law 85-315, approved September 9, 1957, relating to the qualifications of Federal jurors. It called this to the attention of the jury commissioners only by quoting that portion of the Act; nothing was said in the

bulletin that attempted to interpret or comment upon that portion of the Act of Congress. The most the defendants can make of either of these documents is that this Court in its letter, after calling to the attention of the jury commissioners the new law as it pertains to the qualifications of Federal jurors, stated:

> "You will notice that an individual, in order to be qualified as a federal juror, now does not have to meet the qualifications prescribed by the laws of the State of Alabama. This means that the names of qualified female citizens may be and should be placed in the jury box for this district.
>
> "I know from my previous discussions with you concerning the qualifications of jurors in this district that you have not, at any time, discriminated because of any citizen's race or color. However, it may be that you did pass over some citizens that may not have been then qualified according to the laws of the State of Alabama but now are qualified. If that is the case, you should, at the earliest possible time, review those instances.
>
> "I want you to know that since you and Mr. Dobson refilled this jury box, the jurors whose names have been drawn therefrom are of the highest caliber, and this reflects the time and effort that you spent in selecting these individuals. I appreciate very much your serving as a Jury Commissioner in this district."

As a matter of fact, each of the jury commissioners testified on the hearing that the only significance they placed upon either the bulletin from the Administrative Office or the letter from the Court was that Federal jurors no longer had to meet the requirements for jurors set up by the Legislature of the State of Alabama. In short, the defendants' evidence in support of this phase of their motion does not even come close to the prohibition set up in the Murphy case. There is no merit in this phase of the defendants' motion.

This brings us to the last ground which attacks the constitutionality of the "Jury Qualification" portion of the Act of Congress commonly referred to as the Civil Rights Act of 1957, Public Law 85-315.

IV. The Contention of the Defendants that the Sixth Amendment to the Constitution of the United States Requires the Jury To Be Qualified According to the Law of the State of Alabama.

This part of the defendants' motion specifically says the "venire from which the jury was selected in this case was chosen and selected contrary to the 6th Amendment of the United States Constitution, in this: The 6th Amendment provides '. . . jury of the State and District . . .' and defendants allege . . . this means that it must be a jury with the qualifications prescribed by the State law. . . . . "

There is no question but that the jury venire presented to the parties in this case contained the names of several female jurors. As a matter of fact, this term of court in this district was the first time any female has ever served as a juror in either the State or Federal courts sitting in Alabama.

After receiving notice of the passage of Public Law 85-315, which amended § 1861 of Title 26 of the United States Code, the two jury commissioners for the district placed the names of certain qualified female citizens in the jury box for this district; some of these names were drawn for this particular term.

There is no question but that the law of the State of Alabama only provides that "male citizens" are eligible for jury duty. See § 21 of Title 30 of the 1940 Code of Alabama. There is also no question but that prior to the passage of Public Law 65-315, which amended § 1861 of Title 28 of the United States Code, any jurors who served in the Federal courts must have been not "incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." See *Waichet* v. *U.S.*, (CCA 6, 1925), 8 F. 2d 561, cert. den. 270 U.S. 651; *U.S.* v. *Ballard*, (1940, D.C.), 35 F. Supp. 105; *U.S.* v. *Romia*, (1943, D.C.), 52 F. Supp. 857.

Thus, we reach the question raised by this part of defendants' motion: Does the Congress of the United States have the authority to set up the qualifications of jurors who are to serve in the Federal courts without regard to the qualifications set up by the States wherein the Federal courts sit.

and, if so, does that part of Public Law 85-315 relating to the qualifications of Federal jurors violate the rights of these defendants as guaranteed by the Sixth Amendment to the Constitution of the United States?

For these defendants to prevail under their Sixth Amendment theory, the words in that Amendment, "by an impartial jury of the State and district wherein the crime shall have been committed . . ." must be construed to mean an impartial jury *qualified* under both the Federal law and the laws of the State wherein the crime was committed. In other words, the defendants say the jury cannot be ". . . of the State and district . . ." unless the jurors are *qualified according to the laws of the State* wherein the District Court sits. Such a contention cannot be correct. It is the opinion of this Court and it is now held that the words, "of the State and district" only mean from the geographic area of the State and district wherein the crime shall have been committed and "wherein the District Court sits." The use of the words "and district" confirms such conclusion because the "district" has no legislative body to set up any laws relating to jury qualifications or anything else. Therefore, it follows that the meaning the defendants would have this Court attach to that part of the Sixth Amendment of the Constitution of the United States is an impossible one.

The only point left insofar as this phase of the defendants' motion is concerned is whether or not the Congress of the United States has the authority to set up qualifications for Federal jurors without regard to the qualifications set up by the State wherein the District Court sits. This Court is assuming, of course (and there can be no doubt about it), that the words as used in Public Law 85-315, "Any citizen of the United States . . ." includes a female citizen of the United States.

In the case of *Bricken* v. *U.S.*, 123 F. 2d 341 (8 CCA, 1941), the court stated:

> "By the 6th Amendment of the Constitution the appellant was entitled to a trial by an impartial jury.

[4] These defendants do not claim any bias, prejudice, partiality, or disqualification on the part of any of the jurors on the venire except that the females were disqualified according to the law of the State of Alabama.

> The contention that Diggs was not a qualified juror because he had sat upon a jury at a trial in the state court within one year is without merit. The qualification of jurors in the federal court upon this ground is controlled by federal law. Section 286 of the Judicial Code, 28 U.S.C.A. § 423, provides that 'No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.'"

From this case, it appears that Congress does have the authority to set up qualifications for Federal jurors without regard to State qualifications.

This Court, therefore, concludes that the Congress of the United States does have the authority to set up the qualifications for Federal jurors without regard to any qualifications that may be set up by the legislative bodies of the various States wherein the District Courts sit. This Court also concludes that that part of Public Law 85-315 relating to "Qualifications of Federal jurors" is constitutional and not violative of the rights of these defendants under the Sixth Amendment of the Constitution of the United States.

Aside from any constitutional question, this particular part of defendants' motion must fail because these defendants were certainly aware of the statute of the State of Alabama (Title 30, § 21; 1940 Code of Alabama), which made only "male citizens" qualified for jury duty in the State of Alabama, and they were likewise certainly aware of the fact that there were women on the jury venire.[2] The record discloses that neither of these defendants prior to going to trial at either time raised any objection concerning the qualifications of any member on the jury venire. It is the opinion and conclusion of this Court that this conduct on the part of these defendants constituted a waiver

[2] As a matter of fact, they accepted three of the women on the jury that convicted them.

of any objection they may have had to the qualification of these female jurors. This includes the objection they are now making that these female jurors were not qualified according to the laws of the State of Alabama and therefore were not qualified according to the Federal law. See the case of *Ford v. U.S.*, (5th C.C.A. 1953), 201 F. 2d 300, wherein the Court stated:

> "While previous conviction of a felony does not render the convicted person fundamentally incompetent to sit as a juror, it is a ground of challenge for cause, which the defendant may insist upon or waive, as he elects. If not seasonably exercised, the objection is waived. It is the right and duty of a defendant to discover on *voir dire* examination, or from other sources, whether a talesman is subject to disqualification for cause. Where the objection to a juror relates, not to actual prejudice or other fundamental incompetence, but to a statutory disqualification only, such disqualification is ordinarily waived by failure to assert it until after verdict, even though the facts which constitute the disqualification were not previously known to the defendants. The objection based upon the previous felony convictions comes too late after verdict, no actual bias or prejudice being shown. [cases cited]."

See also the case of *Hauratty v. U.S.*, (5th C.C.A. 1955), 218 F. 2d 358, cert. den. 349 U.S. 928, which dealt with "excluding" women from jury duty.

For the foregoing reasons, the motion of these defendants, seeking to have this Court set aside the jury verdicts of November 20, 1957, finding them guilty as charged in the indictment in this cause, must fail. An order will be entered accordingly.

Done, this the 2nd day of January, 1958.

FRANK M. JOHNSON, JR.,
United States District Judge.

APPENDIX "A"

"(The above styled case coming on to be heard at 1:30 p.m., November 20, 1957, the following occurred):

"The COURT: Now, Mr. Clerk, which jury do you have in the box?

"The CLERK: Jury number two, sir.

"The COURT: All right. That is all right. I see it. All right. Motion in this case has been filed, and I have read it, and the motion for continuance is overruled. Calling for trial at this time——

"Mr. WALTERS: We accept.

"The COURT: —the case of the United States against Willie Wilson and Morris Griffin. All of the jurors that were selected for the trial of this case this morning may be excused until three thirty this afternoon. You will not be eligible to sit again on the trial of that case. Now, is there any juror that heard any of the testimony that was given on the trial of that case this morning?

"(Two jurors stood).

"The COURT: You are also disqualified.

"Mr. WALTERS: May we get these names, Judge?

"The COURT: All right. This is Juror Billis, and state your name for the record, please, ma'm.

"Juror SMITH: Mrs. Hugh Smith——

"The COURT: Mrs. Hugh Smith.

"Juror SMITH: —Langdale.

"The COURT: Mrs. Hugh Smith, all right. Now, call two other jurors and put them in the box.

"The CLERK: O. G. Hinkle and Aaron Aronov, take the box, please.

"The COURT: Now, call the next sixteen jurors, call their names. Answer if your name is called, please.

"The CLERK: Hudson O. Brock.

"Juror BROCK: Here.

"The CLERK: McMillan Lane.

"Juror LANE: Here.

"The CLERK: P. H. Polk.

"Juror POLK: Here.

"The CLERK: Charley J. Cole.

"Juror COLE: Here.

"The CLERK: D. Carl Gay.
"Juror GAY: Here.
"The CLERK: Roy Bowen:
"Juror BOWEN: Here.
"The CLERK: Will Patton:
"Juror PATTON: Here.
"The CLERK: John S. Hodgson.
"Juror HODGSON: Here.
"The CLERK: Bryan B. Marsh.
"Juror MARSH: Here.
"The CLERK: Oscar A. Pindle.
"Juror PINDLE: Here.
"The CLERK: J. M. Stoudemire.
"Juror STOUDEMIRE: Here.
"The CLERK: Guy Perdue.
"Juror PERDUE: Here.
"The CLERK: Mrs. Olive Andrews.
"Juror ANDREWS: Here.
"The CLERK: Lynn M. Moore.
"Juror MOORE: Here.
"The CLERK: Alma M. Glover.
"Juror GLOVER: Here.
"The CLERK: James B. Ewing.
"Juror EWING: Here.
"The COURT: All right. Any of those jurors whose names were just called, and is there either of you in the box that heard any of the testimony in the trial this morning? That is, the case of the United States——
"Juror BOWEN: I heard the first two witnesses.
"The COURT: All right, sir; what is your name, please?
"Juror BOWEN: Roy Bowen.
"The COURT: All right, Mr. Bowen, you may be excused until three thirty this afternoon. Call the next juror.
"The CLERK: Joe R. Pickens.
"Juror PICKENS: Here.
"The COURT: All right, Mr. Pickens; did you hear any of the testimony in the case this morning?
"Juror PICKENS: No, sir.
"The COURT: All right, sir. Now, subject to your motion, gentlemen, I know that it is subject to your motion——
"Mr. WALTERS: I beg your pardon, Judge?

"The Court: Subject to your motion, are you ready for trial?

"Mr. Walters: Judge, I would like to ask the jurors some questions.

"The Court: All right. I am going to—I am going to question them, myself.

"Mr. Walters: Could I give you the questions which I have written, Judge?

"The Court: Yes, sir; I will consider them.

"(Messrs. Walters and Varner went to the bench and conferred with the court)

"The Court: Now, if you jurors will, you in the box and you whose names were called, give me your attention. The case of the United States against Willie Wilson and Morris Griffin has been called for trial. The attorneys representing the defendants in this case, Mr. Walden of Montgomery, and Mr. Walters of Troy; representing the Government, Mr. Davis, Mr. Varner, and Mr. Daughtry. Are you related to or acquainted with, or are you related to or acquainted with either of the lawyers in the case. Now, there are several of you that are I know, so that the record might reflect that you did make response, stand and state your name and which lawyers you are acquainted with or related to. All right.

"Juror Parker: Mrs. Thomas Parker; I am acquainted with Mr. Varner.

"The Court: All right, is that business or social?

"Juror Parker: Social.

"The Court: All right.

"Juror Ward: I am acquainted with Mr. Davis: John Ward; I am acquainted with Mr. Davis.

"The Court: All right, Mr. Ward. All right.

"Juror Bell: I am acquainted with Mr. Davis.

"The Court: That is Mrs. Bell: Mrs. Bell, gentlemen. Mr. Aronov?

"Juror Aronov: I am Aaron Aronov, and acquainted with Mr. Varner, Mr. Davis, and Mr. Walden.

"Juror Stone: Henry Stone, acquainted with Mr. Davis.

"The Court: All right, Juror Stone. All right, sir?

"Juror Hodgson: John Hodgson; I am acquainted with Mr. Davis and Mr. Varner.

"Juror MARSH: Marsh; I am acquainted with Mr. Davis and Mr. Varner.

"The COURT: That is Mr. Marsh.

"Juror LANE: McMillan Lane; I am acquainted with Varner.

"The COURT: All right, Mr. Lane.

"Juror POLK: P. H. Polk; I am acquainted with Mr. Varner.

"The COURT: All right.

"Juror ANDREWS: Olive Andrews; I am acquainted with Mr. Davis.

"The COURT: All right. Is any of that acquaintanceship other than social or business, let it be known; if it goes beyond that. Do either of you that made response to this question feel as if that acquaintanceship would prejudice you or embarrass you to such an extent that you could not render a fair and a true verdict in this case? I believe I have inquired of you whether or not you were in the room and heard any of the evidence in the case this morning that was tried. Have either of you had any discussion with any one concerning the evidence that was taken on the trial of that case this morning? I don't know whether it's applicable or not, but I am going to ask it; if either of you were challenged in that case this morning, that is, excused by the Government or by the defendants, would that prejudice you if you were selected as a juror on the trial of this case so that you could not render a fair verdict in the case according to the law and the evidence? If it would, or if you feel as if it would, let it be known at this time. All right.

"(Messrs. Walters and Davis went to the bench and conferred with the court)

"The COURT: All right. Did either of you jurors hear the argument or any part of the argument in the case this morning? Have either of you jurors heard of any part of the proceeding that may have taken place in the case of the United States against Willie Wilson and Morris Griffin this morning?

"Juror HOUSSON: Judge, I don't know whether it is exactly in answer to your question, but I did talk to C. T. Fitzpatrick, and he told me that you declared a mistrial.

"The Court: All right, did he tell you the reason, Mr. Hodgson?

"Juror Hodgson: No, sir.

"The Court: He did not. All right. Do you feel as if the fact that I declared a mistrial in the case would prejudice you in the event you are selected as a juror on the trial of this case?

"Juror Hodgson: No, sir.

"The Court: Let me tell all you jurors that this is a completely new proceeding, separate and apart from that proceeding this morning.

"Juror Ward: Judge, your honor, I was also made aware of the fact that you had declared a mistrial in the case, but I did not discuss why or the men did not.

"The Court: You heard that I had declared——

"Juror Ward: I heard you had declared a mistrial.

"The Court: Did not hear the reason?

"Juror Ward: Well, no, sir; simply was that it was a statement made or——

"The Court: During the course of the argument?

"Juror Ward: Yes, sir; that you ruled——

"The Court: Mr. Ward, do you feel as if that would prejudice you and make it impossible for you to render a fair and a true verdict in this case?

"Juror Ward: No, sir; I do not.

"The Court: Mr. Aronov?

"Juror Aronov: Your honor, I also heard that the case was declared a mistrial this morning, and had no additional information other than the fact that it was stated that the case had been mistried.

"The Court: All right, sir. Mr. Aronov, do you feel as if that would prejudice you?

"Juror Aronov: No sir; I do not.

"The Court: All right.

"Juror DEAL: I also heard the same thing.

"The COURT: Did you hear anything in addition to that?

"Juror DEAL: No, sir.

"The COURT: State your name for the record.

"Juror DEAL: L. R.—Louie R. Deal.

"The COURT: Mr. Deal, do you feel as if you were selected on the case you could render a true and fair verdict?

"Juror DEAL: Yes, sir.

"The COURT: All right.

"Juror PARKER: I heard after I sat in the box that it was declared a mistrial, but no other additional information at all.

"The COURT: This is Mrs. Parker. Do you feel as if you could render a fair verdict in the case if you were selected, Mrs. Parker?

"Juror PARKER: Yes, sir.

"The COURT: All right.

"Juror WALTHALL: I also heard it was a mistrial as I came up to the Post Office, but I didn't hear anything about the argument.

"The COURT: Do you feel as if you could render a fair verdict for the defendants and the Government in the case if you are selected as a juror?

"Juror WALTHALL: Yes, sir.

"The COURT: State your name for the record.

"Juror WALTHALL: Mrs. George Walthall.

"The COURT: All right, Mrs. Walthall. Just a minute, there is one other.

"Juror BARNES: Your Honor, I also heard that it was a mistrial, however, it won't prejudice me in any way.

The COURT: State your name for the record.

"Juror BARNES: Robert C. Barnes.

"The COURT: All right, there is one other juror back here.

"Juror PINDLE: I heard that it was a mistrial, but no further information.

"The COURT: All right, do you feel as if you could

render a fair verdict in the case if you were selected as a juror?

"Juror PINDLE: Yes, sir.

"The COURT: State your name for the record.

"Juror PINDLE: Oscar A. Pindle.

"The COURT: All right.

"Juror GLOVER: I heard it was a mistrial when I reported back this afternoon, but no further information was given; Alma M. Glover, Montgomery.

"The COURT: Mrs. Glover, do you feel as if you were selected in this case you could render a fair verdict?

"Juror GLOVER: Yes, sir.

"The COURT: All right.

"Juror MOORE: L. M. Moore; I heard it was a mistrial on the statement of one of the attorneys, but it has no effect on my decision one way or the other.

"The COURT: All right, sir.

"Juror EWING: I also heard the same statement, your honor, and I do not think it would prejudice me in any way.

"The COURT: State your name. You have to state your name, the reporter didn't get it please, sir.

"Juror EWING: J. B. Ewing, Alexander City, Alabama.

"Juror PERDUE: Guy Perdue, Luverne; I heard you had a mistrial, but didn't hear any further information; don't think it would affect me, your honor.

"The COURT: All right.

"Juror OAKLEY: L. M. Oakley, Jr.; I heard also it was a mistrial, but I don't think that would have any affect on my decision.

"The COURT: All right.

"Juror CHANNELL: I also heard it was a mistrial, Judge.

"The COURT: State your name.

"Juror CHANNELL: Juddy L. Channell.

"The COURT: Do you feel as if you could render a fair and true verdict in the case?

"Juror CHANNELL: Yes, sir.

"Juror ANDREWS: Olive Andrews; I heard the information that it was a mistrial.

"The COURT: Do you feel if you were selected as a juror on the case you could render a true verdict?

"Juror ANDREWS: Yes, sir.

"The COURT: You say you do?

"Juror ANDREWS: No, sir.

"The COURT: You do not?

"Juror ANDREWS: I understood the question would it affect me; no, it wouldn't.

"The COURT: Would not affect you; all right. Any others? All right.

"Juror LANE: McMillan Lane; I heard it on the way back up here.

"The COURT: You feel as if, were you selected, Mr. Lane, you could render a fair verdict in the case?

"Juror LANE: Yes, sir.

"The COURT: All right, gentlemen. Statements of the jurors are offered in support of the motion for continuance?

"Mr. WALTERS: Correct.

"Mr. WALDEN: Your honor, may I say one word in support of that motion, that it's evident that practically every juror that we would have to strike from has heard about the mistrial. Now, we in making our motion are not attempting to impugn the honesty or integrity of any of these jurors; we do not think that anyone would be consciously influenced by this previous proceedings, but perhaps unconsciously to the prejudice of the defendants that they would be, and therefore I would like to have that included in our grounds for a continuance, that just stated.

"The COURT: The mistrial wasn't granted because of any misconduct on your part, or Mr. Walters' part or the part of either of the defendants in the case; it was because of an error that was made, without any intention I think, on the part of one of the Government attorneys.

"Mr. WALDEN: Yes, sir.

"The COURT: I don't see how it could prejudice your clients in the trial of the case.

"Mr. WALDEN: What I had reference to was the fact that each one had heard that there was a mistrial.

"The COURT: How does that prejudice?

"Mr. WALDEN: Well, perhaps unconsciously they may be

influenced into a decision one way or the other against our clients.

"The COURT: Well, if it was in favor of your clients, it wouldn't prejudice?

"Mr. WALDEN: I wouldn't object.

"The COURT: All right. What says the Government to the jury in the box? You want them identified, gentlemen?

"Mr. VARNER: You want them identified—we don't your Honor, excuse me.

"The COURT: All right, I will ask the jury to identify themselves if you wish it, gentlemen.

"Mr. WALDEN: Y'all satisfied with the jury?

"Mr. VARNER: Yes, sir; we are satisfied with the jury in the box.

"The COURT: All right. What says defendants?

"Mr. WALTERS: Excuse Juror Brown and Juror Stone.

"The COURT: Those two jurors can stand aside. Call the next two.

"The CLERK: Hudson Brock, McMillan Lane; take the box, please.

"The COURT: What says the Government?

"Mr. DAVIS: Government satisfied.

"The COURT: What says the defendant?

"Mr. WALDEN: Who was the other one?

"The CLERK: Hudson Brock.

"Mr. WALDEN: Brock.

"Mr. WALTERS: We excuse Juror Brock.

"The CLERK: P. H. Polk, take the box.

"The COURT: What says the Government?

"Mr. DAVIS: Government will excuse P. H. Polk.

"The COURT: Next juror.

"The CLERK: Charley J. Cole.

"The COURT: What says the defendant?

"Mr. WALTERS: We will excuse Juror Cole.

"The CLERK: D. Carl Gay.

"The COURT: What says the Government?

"Mr. DAVIS: Government satisfied.

"The COURT: What says defendant?

"Mr. WALTERS: We will excuse Juror Gay.

"The CLERK: Will Patton.

"Mr. DAVIS: Satisfied.

"The COURT: What says defendant?
"Mr. WALTERS: Defendants excuse Juror Patton.
"The CLERK: John S. Hodgson.
"The COURT: Just a minute, Will Patton, you can have a seat in the court room, you have been excused.
"Juror PATTON: Yes, sir.
"Mr. DAVIS: Government satisfied.
"Mr. WALTERS: Defendants are satisfied."

APPENDIX "B"

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON 25, D. C.

DIRECTOR
WILLIAM L. ELLIS
ASSISTANT DIRECTOR

September 16, 1957.

BULLETIN No. 488

To: Judges, United States Courts of Appeals (57)
Judges, United States District Courts (165)
Clerks of United States District Courts (246)
United States Marshals (102)
United States Jury Commissioners

LAWS WITH REFERENCE TO JURY SERVICE

The 85th Congress has passed three bills with reference to jury service which should be called to your attention.

1. Civil Rights Act of 1957, Public Law 85-315, approved September 9, 1957. Section 152 provides as follows:

"Sec. 152. Section 1861, title 28, of the United States Code is hereby amended to read as follows:

"§1861. Qualifications of Federal jurors

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

"(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write, speak, and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

2. Mileage and Subsistence Allowances for Grand Petit Jurors. Public Law 85-299, approved September 7, 1957.

This increases the allowances of grand and petit jurors as follows:

Subsistence from $5 per day to $7 per day; and
Mileage from 7 cents per mile to 10 cents per mile.

3. Use of Certified Mail in Summoning Jurors, Public Law 85-259, approved September 2, 1957.

This provides that each person drawn for jury service may be served personally or by registered *or certified* mail. Certified mail now costs 30 cents plus postage, including return receipt while registered mail costs 60 cents plus postage, also including return receipt.

W. L. ELLIS,
Acting Director.

APPENDIX "C"

UNITED STATES DISTRICT JUDGE'S CHAMBERS
MIDDLE DISTRICT OF ALABAMA

Post Office Box 35
Montgomery, Alabama

Frank M. Johnson, Jr.
DISTRICT JUDGE

September 19, 1957.

Mr. William O. Baldwin.
First National Bank,
Montgomery, Alabama.

Dear Mr. Baldwin:

Since you have been appointed and are now serving as the Jury Commissioner in this district, I feel that I should call your attention to the fact that the Congress of the United States, by Public Law 85-315 on September 9, 1957, changed the law pertaining to the qualifications of federal jurors. The new law now reads as follows:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—
>
> "(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
>
> "(2) He is unable to read, write, speak, and understand the English language.
>
> "(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

You will notice that an individual, in order to be qualified as a federal juror, now does not have to meet the qualifications prescribed by the laws of the State of Alabama. This means that the names of qualified female citizens may be and should be placed in the jury box for this district.

I know from my previous discussions with you concerning the qualifications of jurors in this district that you have not, at any time, discriminated because of any citizen's race or color. However, it may be that you did pass over some citizens that may not have been then qualified according to the laws of the State of Alabama but now are qualified. If that is the case, you should, at the earliest possible time, review those instances.

I want you to know that since you and Mr. Dobson refilled this jury box, the jurors whose names have been drawn therefrom are of the highest caliber, and this reflects the time and effort that you spent in selecting these individuals. I appreciate very much your serving as a Jury Commissioner in this district.

Sincerely yours,

FRANK M. JOHNSON, JR.,
United States District Judge.

Filed January 3, 1958. R. O. Dobson, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Cr. No. 10,990-X

UNITED STATES OF AMERICA

vs.

WILLIE WILSON AND MORRIS GRIFFIN

ORDER

This cause was submitted to the Court upon the motion of the defendant Willie Wilson, seeking to have this Court set aside the jury verdict of guilty rendered on November 20, 1957, and to grant said defendant a new trial.

For the reasons set forth in the memorandum opinion filed in this action on January 2, 1958, and for good cause shown:

It is the ORDER, JUDGMENT and DECREE of this Court that the motion of the defendant Willie Wilson, seeking to have

this Court set aside the jury verdict of guilty rendered November 20, 1957, and to grant said defendant a new trial should be and the same is hereby overruled and denied.

Done, this the 3rd day of January, 1958.

FRANK M. JOHNSON, JR.,
United States District Judge.

Filed January 3, 1958. R. O. Dobson, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Cr. No. 10,990-N

UNITED STATES OF AMERICA

vs.

WILLIE WILSON AND MORRIS GRIFFIN

ORDER

This cause was submitted to the Court upon the motion of the defendant Morris Griffin, seeking to have this Court set aside the jury verdict of guilty rendered on November 20, 1957, and to grant said defendant a new trial.

For the reasons set forth in the memorandum opinion filed in this action on January 2, 1958, and for good cause shown:

It is the ORDER, JUDGMENT and DECREE of this Court that the motion of the defendant Morris Griffin, seeking to have this Court set aside the jury verdict of guilty rendered on November 20, 1957, and to grant said defendant a new trial, should be and the same is hereby overruled and denied.

Done, this the 3rd day of January, 1958.

FRANK M. JOHNSON, JR.,
United States District Judge.

End of Appendix B

APPENDIX C

CIVIL RIGHTS ACT OF 1957

PUBLIC LAW 85-315; 71 STAT. 634

[H. R. 6127]

An Act to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

PART I—ESTABLISHMENT OF THE COMMISSION ON CIVIL RIGHTS

SEC. 101. (a) There is created in the executive branch of the Government a Commission on Civil Rights (hereinafter called the "Commission").

(b) The Commission shall be composed of six members who shall be appointed by the President by and with the advice and consent of the Senate. Not more than three of the members shall at any one time be of the same political party.

(c) The President shall designate one of the members of the Commission as Chairman and one as Vice Chairman. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman, or in the event of a vacancy in that office.

(d) Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner, and subject to the same limitation with respect to party affiliations as the original appointment was made.

(e) Four members of the Commission shall constitute a quorum.

RULES OF PROCEDURE OF THE COMMISSION

SEC. 102. (a) The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses.

(f) Except as provided in sections 102 and 105(f) of this Act, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

(g) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

(i) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

(j) A witness attending any session of the Commission shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $12 per day for expenses of sub-

sistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpena issued on behalf of the Commission or any subcommittee thereof.

(k) The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business.

COMPENSATION OF MEMBERS OF THE COMMISSION

SEC. 103. (a) Each member of the Commission who is not otherwise in the service of the Government of the United States shall receive the sum of $50 per day for each day spent in the work of the Commission, shall be reimbursed for actual and necessary travel expenses, and shall receive a per diem allowance of $12 in lieu of actual expenses for subsistence when away from his usual place of residence, inclusive of fees or tips to porters and stewards.

(b) Each member of the Commission who is otherwise in the service of the Government of the United States shall serve without compensation in addition to that received for such other service, but while engaged in the work of the Commission shall be reimbursed for actual and necessary travel expenses, and shall receive a per diem allowance of $12 in lieu of actual expenses for subsistence when away from his usual place of residence, inclusive of fees or tips to porters and stewards.

DUTIES OF THE COMMISSION

SEC. 104. (a) The Commission shall—

(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from the date of the enactment of this Act.

(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist.

POWERS OF THE COMMISSION

SEC. 105. (a) There shall be a full-time staff director for the Commission who shall be appointed by the President by and with the advice and consent of the Senate and who shall receive compensation at a rate, to be fixed by the President, not in excess of $22,500 a year. The President shall consult with the Commission before submitting the nomination of any person for appointment to the position of staff director. Within the limitations of its appropriations, the Commission may appoint such other personnel as it deems advisable, in accordance with the civil service and classification laws, and may procure services as authorized by section 15 of the Act of August 2, 1946 (60 Stat. 810; 5 U.S.C. 55a),[94] but at rates for individuals not in excess of $50 per diem.

(b) The Commission shall not accept or utilize services of voluntary or uncompensated personnel, and the term "whoever" as used in paragraph (g) of section 102 hereof shall be construed to mean a person whose services are compensated by the United States.

(c) The Commission may constitute such advisory committees within States composed of citizens of that State and

[94] 5 U.S.C.A. § 55a.

may consult with governors, attorneys general, and other representatives of State and local governments, and private organizations, as it deems advisable.

(d) Members of the Commission, and members of advisory committees constituted pursuant to subsection (e) of this section, shall be exempt from the operation of sections 281, 283, 284, 434, and 1914 of title 18 of the United States Code,[35] and section 190 of the Revised Statutes (5 U.S.C. 99).[36]

(e) All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.

(f) The Commission, or on the authorization of the Commission any subcommittee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in section 102(j) and (k) of this Act, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman.

(g) In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter

[35] 18 U.S.C.A. §§ 281, 283, 284, 434.

[36] 5 U.S.C.A. § 99.

1914.

under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

APPROPRIATIONS

SEC. 106. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, so much as may be necessary to carry out the provisions of this Act.

PART II—TO PROVIDE FOR AN ADDITIONAL ASSISTANT ATTORNEY GENERAL

SEC. 111. There shall be in the Department of Justice one additional Assistant Attorney General, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall assist the Attorney General in the performance of his duties, and who shall receive compensation at the rate prescribed by law for other Assistant Attorneys General.

PART III—TO STRENGTHEN THE CIVIL RIGHTS STATUTES, AND FOR OTHER PURPOSES

SEC. 121. Section 1343 of title 28, United States Code,[97] is amended as follows:

(a) Amend the catch line of said section to read, "§ 1343. Civil rights and elective franchise"

(b) Delete the period at the end of paragraph (3) and insert in lieu thereof a semicolon.

(c) Add a paragraph as follows:

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

SEC. 122. Section 1989 of the Revised Statutes (42 U.S.C. 1993)[98] is hereby repealed.

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[97] 28 U.S.C.A. § 1343.

[98] 42 U.S.C.A. § 1993.

PART IV—TO PROVIDE MEANS OF FURTHER SECURING AND PROTECTING THE RIGHT TO VOTE

SEC. 131. Section 2004 of the Revised Statutes (42 U.S.C. 1971),[39] is amended as follows:

(a) Amend the catch line of said section to read, "Voting rights".

(b) Designate its present text with the subsection symbol "(a)".

(c) Add, immediately following the present text, four new subsections to read as follows:

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

[39] 42 U.S.C.A. § 1971.

"(c) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel."

PART V—TO PROVIDE TRIAL BY JURY FOR PROCEEDINGS TO PUNISH CRIMINAL CONTEMPTS OF COURT GROWING OUT OF CIVIL RIGHTS CASES AND TO AMEND THE JUDICIAL CODE RELATING TO FEDERAL JURY QUALIFICATIONS

SEC. 151. In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however*, That in case the accused is a natural person the fine to be paid shall not exceed the sum of $1,000, nor shall imprisonment exceed the term of six months: *Provided further*, That in any such proceeding for criminal contempt at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

SEC. 152. Section 1861, title 28, of the United States Code[1] is hereby amended to read as follows:

"§ 1861. Qualifications of Federal jurors.

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district is competent to serve as a grand or petit juror unless—

"(1) He has been convicted in a State or Federal Court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write, speak, and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities, to render efficient jury service."

SEC. 161. This Act may be cited as the "Civil Rights Act of 1957".

Approved September 9, 1957.

[1] 28 U.S.C.A. § 1861.

APPENDIX D

OFFICER GENTNER: (R 84)

A. Sagging down. We proceeded, we both noticed that it was heavily loaded, and turned and—turned our car around to get a closer look at this Ford, and we turned around and proceeded back up north, and overtook the car and pulled abreast of it. When I pulled abreast of it—when we pulled abreast of the car, I looked over and in the right front seat of this Ford I recognized Morris Griffin.

(Note: After seeing the "heavily loaded" car the officers said "turned around". This was the inception. The recognition and search followed).

OFFICER MCGINNIS (R 112)

Q. You called Morris, also, but you didn't know Morris?
A. I knew Morris prior to this time; I didn't recognize him as being the man, but I knew him.

OFFICER MCGINNIS (R 133)

Mr. WALTERS:

You knew that particular Wilson?

WITNESS:

No, that is the reason I want to qualify it. When I saw this man, I thought he was his brother, General Wilson, who I have been informed has a reputation.

Certificate of Service

I, John C. Walters, Attorney for Petitioners hereby certify that I mailed two copies of the foregoing Petition for Certiorari, which was duly filed in the Clerk's Office of the United States Supreme Court on the 28th day of August, 1958, via first class air-mail, postage fully prepaid, to the Honorable Hartwell Davis, United States District Attorney, second floor, U. S. Post Office, Montgomery, Alabama, on the 28th day of August 1958.

I further certify, that I personally delivered three copies of the foregoing Petition to the Solicitor General of the United States; at his office or to counsel; or a clerk therein, in Washington, D. C., on the 28th day of August 1958.

Done this, the 28th day of August 1958.

JOHN C. WALTERS,
Court Square,
Troy, Alabama,
Counsel for the Petitioners.

SEP 25 1958
JAMES R. BROWNING, Clerk

No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIE WILSON AND MORRIS GRIFFIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 255 F. 2d 686. The opinion of the District Court (Pet. App. B) is reported at 158 F. Supp. 442.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1958. A petition for rehearing was denied on July 30, 1958. The petition for a writ of certiorari was filed on August 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was probable cause to stop and search the automobile in which petitioners were transporting bootleg liquor.

2. Whether the trial court erred in denying petitioners' motion for a continuance when it set the case down for retrial on the same day it had granted a mistrial.

3. Whether the petitioners were prejudiced by a letter from the United States District Judge and a directive from the Administrative Office of the United States Courts to the jury commissioner of the Middle District of Alabama informing him of recent changes in federal law relating to qualifications of jurors in federal courts.

4. Whether Congress may fix qualifications for federal jurors without regard to state laws.

STATEMENT

On November 20, 1957, in the United States District Court for the Middle District of Alabama petitioners were found guilty on three counts of a four-count indictment charging them with the possession and concealment of liquor upon which the federal tax had not been paid (26 U. S. C., Supp. V, §§ 5008 (b), 5632, 5691, 7206 (4)) (R. 151). Each of the petitioners was sentenced to 18 months' imprisonment (R. 158, 160). On appeal the convictions were affirmed (Pet. App. A). 255 F. 2d 686.

1. The case was called for trial on the morning of November 20, 1957 (R. 57). The petitioners pleaded not guilty, a jury was selected and qualified, testimony

was taken and the case proceeded to the point of closing argument by the counsel to the jury. Neither of the petitioners had testified during the trial and during the argument to the jury the United States Attorney stated that "There is no denial in this case * * *. There is nobody that has come here * * *" (R. 57). Petitioners objected and the trial court declared a mistrial at approximately 11:15 a. m. The case was reset for trial at 1:30 p. m. the same day (R. 47, 58). The petitioners objected and filed a motion for a continuance which was denied (R. 47–49, 59). Another jury was qualified and selected at 1:30 p. m. that day (R. 58–80). All the jurors who had sat on the first case were disqualified by the court and all the jurors who had heard the testimony or argument or who had heard the testimony or arguments discussed were declared by the court to be disqualified (Pet. App. B, "A"; R. 63, 66, 67).

2. The evidence for the government showed that on August 26, 1957, two agents of the Alcohol and Tobacco Tax Unit of the Treasury Department, while driving along an Alabama highway, spotted an automobile that appeared to be heavily loaded, the rear end of the car being extremely low (R. 83, 84, 112–113). The agents turned their car around and pulled abreast of the heavily loaded car (R. 84). One of the agents recognized the man in the right front seat as Morris Griffin, whom he knew to have a record and reputation as a bootlegger (R. 84–88, 93). The other agent recognized the driver as one of four brothers, three of whom were reputed to be dealing in moonshine whiskey (R. 113–114, 122–124). After the men

were recognized, the agents turned on the siren of their car and ultimately forced the car to halt (R. 86, 114). Petitioner Griffin ran away (R. 87). In the automobile the agents found 75 gallons of non-tax-paid whiskey (R. 98–99). Petitioner Wilson was taken into custody at the time (R. 110).

Before trial, both petitioners filed a motion seeking to suppress the evidence obtained by the agents (R. 3–4), and during the trial the petitioners repeatedly objected to the introduction of testimony concerning the 75 gallons of whiskey (R. 88, 89, 97, 109). The trial court denied petitioners' motion concluding that there was probable cause to stop and search the automobile (R. 44–47).

ARGUMENT

1. Petitioners' argument that there was insufficient probable cause to stop and search the automobile without a warrant is based on the assumption that the search started when the agents, seeing the heavily laden car, decided to follow it (Pet. 8–10). The evidence is clear, however, that the agents did nothing which could be construed as the start of a search until after they had recognized Griffin as the passenger, and the driver as a member of a bootlegging family. They each testified that it was only after that recognition that they sounded their siren. Thus, by the time the agents took any action which could be construed as the beginning of a search, they knew, not only that the rear of the car was very low, but that known dealers in illegal liquor were in the car. By the time they brought the car to a halt, they had the additional fact that the occupants refused to obey the

siren signal. And before the actual search, there was the further fact that Griffin fled from the agents. The courts below were justified in concluding that the facts known to the agents were sufficient probable cause to request the car to stop, and that by the time of the search there was sufficient probable cause for the search and seizure. *Brinegar* v. *United States*, 338 U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; *Husty* v. *United States*, 282 U. S. 694.

2. Petitioners contend that the trial court erred in not granting their motion for a continuance made during the short interval between the two trials (Pet. 10).

The only reasons given by petitioners for the requested continuance were (1) that unless a new venire was drawn up they might be prejudiced if some of the jurors who had heard testimony in the first trial or who had heard the circumstances surrounding the mistrial remained on the panel, and (2) that the petitioners might be prejudiced if some of the jurors previously challenged or struck by the petitioners remained on the panel (R. 47–49).

As to petitioners' first reason, the record clearly shows that any possibility of prejudice to the petitioners was removed by the trial court's action. Before the second trial began, the judge disqualified for jury service any juror who sat on the first case, any juror who heard any of the testimony or arguments in the first case and any juror who had discussed the testimony or arguments (Pet. App. A; Pet. App. B, "A"). Thus, the parties to the case were, after an extensive *voir dire* examination by the court, tendered

a venire of jurors that had not heard or discussed any of the testimony, arguments or reasons for the mistrial in the first case. As to petitioners' second point, it suffices to say that if the petitioners thought they would be prejudiced by the presence on the jury of previously challenged or struck jurors they were perfectly free to challenge or strike the jurors a second time. The record shows that petitioners did excuse six jurors before the second trial and that petitioners' attorney said that he was satisfied with the jury before the second trial began (R. 77–80).

3. During the month of September, 1957, the Administrative Office of the United States Courts issued a bulletin to United States Jury Commissioners calling their attention to three bills relating to jury service that had been passed by the 85th Congress (Pet. App. B, "B"; R. 220–222). The trial judge also sent a letter to the jury commissioner in his district calling his attention to the fact that Congress had changed the law pertaining to the qualifications of federal jurors and that, under federal law, women were eligible for service. Neither of the documents did more than inform the commissioner of the law governing his selection. They did not, as petitioners contend, keep the commissioner from selecting a jury (Pet. App. B, "C"; R. 218–220). In *United States* v. *Murphy*, 224 Fed. 554, on which petitioners rely (Pet. 13–15), actual selection of jurors was by an Assistant United States Attorney. Here the selection was made by the jury commissioners themselves.

4. After receiving notice of the passage of Public Law 85–315 which permitted women to serve as fed-

eral jurors, the jury commissioners placed the names of qualified women in the jury box, and some of the names were drawn for service on the present case. Alabama law declares that only male citizens are eligible for jury duty. (See Section 21 of Title 30 of the 1940 Code of Alabama.) Petitioners contend that the federal statute is unconstitutional on the ground that the Sixth Amendment's requirement of trial "by an impartial jury of the State and district wherein the crime shall have been committed * * *" means an impartial jury qualified under the law of the state wherein the crime was committed. The words of the Sixth Amendment that an accused shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed" are only geographical qualifications of the jury, guaranteeing that the defendant will be tried by the inhabitants of the state and political subdivision of that state where the crime was committed. See *Salinger* v. *Loisel*, 265 U. S. 224, 232; *Haas* v. *Henkel*, 216 U. S. 462, 473, 474. The Sixth Amendment says nothing as to what law, federal or state, is to be administered in the selection of the jury. Congress, which has power to establish federal courts, define federal crimes, and determine the procedure to be followed, also has power to fix the qualifications for jurors in federal courts. See *Charge to Grand Jury, Treason*, 30 Fed. Cas. 1039, 1040 (No. 18,273; D. Mass.); Cf. *Brickey* v. *United States*, 123 F. 2d 341 (C. A. 8).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1958.